IN THE

Supreme Court of the United States

OCTOBER TERM, 1951 No. 275

UNITED STATES OF AMERICA, EX REL.,
HUBERT JAEGELER,
Petitioner,

v.

UGO CARUSI, Commissioner of Immigration and Naturalization, and CARL ZIMMERMAN, District Director for District No. 2, Philadelphia,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER

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OPINIONS BELOW.

The Opinions in the District Court, *i.e.*, Judge Kirkpatrick, July 15, 1947; September 30, 1948, and October 9, 1950 appear respectively at pages 18, 33 and 35 of the Record.

The Opinion of the Court of Appeals for the Third Circuit, *i.e.*, Judge McLaughlin filed April 2, 1951, appears at page 37 of the Record.

JURISDICTION.

The Judgment of the Court of Appeals for the Third Circuit was filed April 2, 1951. On June 27, 1951, an order extending the time for filing a Petition for Certiorari to August 29, 1951 was issued by Mr. Justice Black (R-44). Petition for Certiorari was filed August 24, 1951. Certiorari was allowed November 5, 1951 (R-45).

Jurisdiction of the Court is invoked under 28 USC 1254 (1) and 2101.

QUESTIONS PRESENTED.

I.

Whether Petitioner's right of voluntary departure, as provided for by Statute, and directed by the Department of Justice, has been so effectively nullified by actions of the Government in requesting all foreign governments not to grant visas to Relator, as to create an impossibility of performance by Relator, and thus deprive him of the right,

and

Was Petitioner entitled to prove the acts complained of, and show that they did prevent his voluntary departure, and

Ia.

The effect of a denial of certiorari upon the determination of other cases, and particularly the effect of the denial of certiorari in the case of U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. 2nd 431, (certiorari denied 337 U. S. 914) upon the present issue, and

II.

Whether a lawful quota immigrant, though a native of an enemy country, is entitled to the full benefits of Procedural due process under the Fifth Amendment, and

III.

Whether the removal order was in violation of International Treaties and agreements, and

IV.

Whether the Joint Resolution of Congress (Public Law 181,—82 Congress; chapter 519,—1st Session; H. J. Res. 289) approved October 19, 1951, terminating the State of War between the United States and the Government of Germany also terminated the authority and Power of the President and the Department of Justice to remove Relator from this country pursuant to authority of the Alien Enemy Act of 1798, R. S. 4067, as amended; and

V.

The error of the Lower Court.

STATUTES AND REGULATIONS INVOLVED.

(1) The Alien Enemy Act of 1798, R. S. 4067, as amended, 40 Statutes 531: 50 U. S. C. 21, *et seq.*

(2) Presidential Proclamation 2655, 10 Fed. Reg. 8947.

(3) Regulations of the Attorney General, 10 Fed. Reg. 12189.

(4) Charter of the United Nations (1949 Congressional Service 964).

(5) Presidential address (1945 Congressional Service 561).

(6) U. S. Participation Act (1945 Congressional Service 598).

(7) Joint Resolution of Congress (Public Law 181; 82nd Congress, chapter 519; 1st Session. H. J. Res. 289) terminating war with Germany.

(8) Statute of July 30, 1947 c. 388, section 1. 61 Statute 633.

STATEMENT OF THE CASE.

a. PETITIONER.

Relator, a native of Germany, was a lawful quota immigrant to the United States in 1925, and has lived in Phila-

delphia with his wife, a naturalized citizen, since 1930. He was employed in business, and so far as appears, his record is clear except as effected by these proceedings. He voluntarily surrendered to the F. B. I. on December 9, 1941 at 1:30 A. M. (after Pearl Harbor).

He was released by the Government in July 1947, and has been at full liberty since then, reporting to the Immigration Department as requested. He returned to his wife, and has lived with her in Philadelphia since then. He has been steadily employed in business. He is presently free. (R-3.)

b. Factual History.

On December 9, 1941, at 1.30 A. M. (after Pearl Harbor) he was taken into custody by the F. B. I. (voluntarily—and without a warrant) as an enemy alien; was given a hearing by an Enemy Hearing Board, and on February 1, 1942 was interned for the duration of the Emergency. A Repatriation Board recommended his removal as being determined "to be dangerous to the public peace and safety of the United States," although hostilities had ceased. He was ordered removed on May 3, 1946. He was released in July 1947. Apparently he was no longer deemed dangerous, if he ever was. (R-4-6.)

c. Court Proceedings.

On May 15, 1947, a Petition for writ of *Habeas Corpus* was filed, which after hearing was allowed. After a further hearing, a trial issue was directed, to permit Relator to prove that he has been deprived of the right of voluntary departure; see opinion Judge Kirkpatrick, July 15, 1947 (R-18). On a second reargument, the District Judge reversed his prior decisions, dismissed the writ of *Habeas Corpus* and remanded Relator to the Custody of Respondents, see Opinion October 9, 1950, Judge Kirkpatrick (R-35). His decision was based on the refusal of your Honorable Court on May 31, 1949 to allow a certiorari in the case of U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. 2nd 431 (certiorari denied. 337 U. S. 914).

On appeal to the Court of Appeals for the Third Circuit, the Lower Court was affirmed; see Opinion by McLaughlin, Circuit Judge, filed April 2, 1951 (R-37).

On Petition filed, a certiorari was allowed November 5, 1951 (R-45).

ARGUMENT.

I.

Whether Petitioner's right of voluntary departure as provided for by Statute and as directed by the State Department was so effectively nullified by actions of the Government as to create an impossibility of performance, and daprive him of that right

and

Was Petitioner entitled to prove the acts complained of, and show that they did prevent his voluntary departure.

(a) RIGHT TO VOLUNTARY DEPARTURE.

The Alien Enemy Act[1] guaranteed to Petitioner the right of voluntary departure, if and when he was ordered to depart from this country. This right was upheld by Mr. Justice Chase in the Von Heymann case[2] which opinion held:

> "His present restraint by the Respondent is unlawful in so far as it interferes with his voluntary departure, since the enforced removal, of which his present restraint is a concomitant, is unlawful before he does 'refuse or neglect' to depart.
>
> It does not appear that this Relator has ever refused, or, except because of his internment, ever neglected to depart."

Judge Rifkin, in the Von Kleczkowski case[3] held,

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[1] The Alien Enemy Act, 50 U. S. C. A. §21-2-3 (§4067—Rev. Stat.).

[2] U. S. *ex rel* Von Heymann *v.* Watkins, 159 Fed. (2d) 650.

[3] U. S. *ex rel* Von Kleczkowski *v.* Watkins, 71 Fed. Sup. at 429.

"Enemy Aliens ordered removed from the United States have the choice of voluntary departure."

and in the Hoehn case[4] Mr. Justice Chase declared:

"Even if we could accept the unsupported statement in the Brief as to Blacklisting, it would not help the Appellant *in the absence of any indication that he tried to depart voluntarily, and was for that reason unable to do so.*"

"The privilege of voluntary departure does not imply that the alien must be able to go to any country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a neglect or refusal to depart voluntarily."[5]

However, "Any foreign country to which he could have gone" presumes a place of livable habitation, not the North Pole, an uninhabitated south sea isle, a pest ridden jungle, another country where he would be an enemy and be imprisoned, as in a Siberian Mine. It must be at least a livable place, for remember we are arbitrarily depriving this man of his home and living (built up and enjoyed for 26 years); and as a civilized country we owe him some obligation, especially as he is not accused of any offence, but is one of a group of people lawfully here, and whom we are sequestering for our supposed self protection.

(b) NOTICE TO DEPART.

Pursuant to the authority contained in the Alien Enemy Act the President, on July 14, 1945 issued his Proclamation No. 2655 (10 R. F. 8947) (Abstracted at p. 49a of Record) and directed the Attorney General to remove alien enemies—in accordance with such Regulations as he might prescribe; and

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[4] U. S. *ex rel* Hoehn *v.* Shaughnessy, 175 Fed. (2d) 116 (certiorari denied 338 U. S. 872).

[5] U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. (2d) 431 (certiorari denied 337 U. S. 914).

By Proclamation No. 2685 (11 F. R 4079) the President fixed 30 days as a reasonable time within which to depart after receipt of such notice.

On April 2, 1947, the Department of Justice notified Relator

> "* * * under the terms of your removal order, you may proceed to any country of your choice, if arrangements can be made. No exit permit is required to leave this country, and you are (and have been) free to depart at any time under such order." (R-14.)

This means any arrangements that Relator can make. It implies that the Government will not interfere with his efforts.

(c) RELATOR LEARNS OF PREVENTIVE MEASURES.

It was then, July, 1947, for the first time that he learned of the measures taken by Respondents to prevent his voluntary departure, and in truth to prevent him from departing to any country except Germany.

(d) WHAT WERE THE PREVENTIVE MEASURES.

Defendant has admitted that it sent

a communication to certain foreign Governments, containing the celebrated Blacklist of 417 names including Relator's name, "suggesting" that such Governments instruct their Consuls not to grant visas to these persons[6]

the Memorandum sent to Foreign Governments[7]

the note sent to Switzerland[8]

the Notice to the Steamship Company[9]

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[6] Affidavit of E. E. Hunt of State Dept. to Defendant's Motion to dismiss *Habeas Corpus*—Record 20.

[7] Memorandum of May, 1946—Record 24.

[8] Note to Switzerland—June, 1946—Record 26.

[9] Letter to Alcoa Steamship Co., July 1, 1946—Record 32.

In answer to Defendant's motion to dismiss the Writ of *Habeas Corpus*, Relator filed a Traverse alleging these facts, and offering to prove his applications for visas were refused because of such actions (R-15).

(e) RELEASE FROM CUSTODY.

However, it was not until later, July, 1947, that Relator was released from custody (Ellis Island) by the Respondent, and he *immediately made* whole hearted efforts to depart.

(f) EFFORTS TO DEPART.

At the Argument before Judge Kirkpatrick in District Court in July 1947 on the Motion to dismiss and the Traverse, Relator, through Counsel, offered to prove that he had gone to all the Consular Offices listed in New York City and that none of them would grant him a visa, and excused themselves and their governments on the basis of the communications from Defendants, some of them even showing him the very communications and Blacklists.

The following is the list of Consular Offices listed in the Telephone Books of New York City in July, 1947 and which we must assume is all of the then available offices. We also included those later listed. After the filing of the Traverse (May 23, 1947) and before argument before the District Court (July 15, 1947), Relator made second and formal applications to all the listed consuls, and the Court was so informed.

We classify the efforts made at each of them at that time in the light of the Opinion of the Circuit Court of Appeals:

1. Albania. No office (*Behind the Iron Curtain*).
2. Afghanistan. No office in July, 1947.
3. Argentina. He applied and was refused.
4. Australia. He applied and was refused.
5. Austria. No office in July, 1947.
6. Belgium. He applied and was refused.

7. Bolivia. He applied and was refused.

8. Brazil. He applied and was refused.

9. Burma. No office in July, 1947. (*Free 1-8-48.*)

10. Canada. He applied and was refused.

11. Chile. He applied and was refused.

12. China. No office in July 1947. (*Part was under control of Russia and part under U. S.*)

13. Columbia. He applied and was refused.

14. Costa Rica. He applied and was refused.

15. Cuba. He applied and was refused.

16. Czechoslovakia. No office—(*Behind Iron Curtain*).

17. Denmark. He applied and was refused.

18. Dominican Republic. He applied and was refused.

19. Ecuador. He applied and was refused.

20. Egypt. He applied and was refused.

21. El Salvador. He applied and was refused.

22. Estonia. No office (*Behind Iron Curtain*).

23. Ethiopia. No office (*Controlled by Enemy—Italy*).

24. Finland. He applied and was refused.

25. France. He applied and was refused.

26. Great Britain. He applied and was refused.

27. Greece. He applied and was refused.

28. Guatemala. He applied and was refused.

29. Germany. No office (*Enemy Country.*)

30. Haiti. He applied and was refused.

31. Honduras. He applied and was refused.

32. Hungary. No office (*under Control of Russia.*)

33. Iceland. No office (*under Control of Denmark, who refused*).

34. India. No office (*under Control of British Crown, who had refused*).

35. Iran. Office was closed.

36. Iraq. No office in July 1947.

37. Ireland. No office in July 1947.

38. Israel. No office in July 1947 (*British Mandate till 5-14-49*).

39. Italy. Enemy Country.

40. Lebanon. No office (*British Controlled*).

41. Liberia. Negro Republic.

42. Lithuania. No office (*Behind Iron Curtain*).

43. Luxembourg. No office (*Control of Allied Military Authority*).

44. Mexico. He applied and was refused.

45. Monaco. Required $5,000 cash for entry. (*Relator was imprisoned for 5½ years, and without funds.*)

46. Netherlands. He applied and was refused.

47. New Zealand. He applied and was refused.

48. Nicaragua. He applied and was refused.

49. Norway. He applied and was refused.

50. Pakistan. No office (*Member of British Comm. of Nations*).

51. Panama. He applied and was refused.

52. Paraguay. He applied and was refused.

53. Peru. He applied and was refused.

54. Russia. Behind the Iron Curtain.

55. Poland. No office (*Behind Iron Curtain*).

56. Roumania. No office (*Behind Iron Curtain*).

57. Portugal. He applied and was refused.

58. Spain. He applied and was refused.

59. Sweden. He applied and was refused.

60. Switzerland. He applied and was refused.

61. Syria. No office (*French Mandate*).

62. Turkey. He applied and was refused.

63. Union of S. Africa. He applied and was refused.

64. Uruguay. He applied and was refused.

65. Venezuela. He applied and was refused.

66. Yugoslavia. No office (*Behind the Iron Curtain*).

67. Bulgaria. No office (*Behind the Iron Curtain*).

Norway, Sweden, Denmark, Italy were applied to although the record of notice to those countries is not available. However their consuls refused for the same stated reasons.

We must also bear in mind that Relator had been in custody since December 9, 1941, that he had no income and was without funds.

(g) WERE HIS EFFORTS TO DEPART HONEST?

Judge McLaughlin, in his opinion (R-41) said there were nations that were not notified, and named:

Germany (29). These were enemy countries.
Austria (5).
Yugoslavia (66).
Roumania (56). These were all behind the iron curtain,
Hungary (32).
Bulgaria (67). also governments that would have im-

Albania (1).	prisoned him.
China (12).	Which had no reliable government, but was partly under control of Russia and partly under control of U. S. Military Government.
India (34).	Which was part of British Empire, and governed from London.
Iraq (36).	Which had no office or consul.

Of course Respondents did not need to notify the enemy governments not to receive him; and there was no need to notify governments that did not have consular offices or means by which Relator's application for visa could have been accepted. Mr. Justice McLaughlin said there was a wide choice of places to which Relator could have gone, and cited Austria (5) India (34) and Yugoslavia (66), but, as we have just shown, that was not so. The Judge then went on to say,

> "It would seem that appellant was faced with no real dilemma. He just did not bother." (R-41.)

Under the decisions cited, Relator was entitled to show any real efforts that he made to voluntarily depart, and why he did not succeed. The Court did not have a right to pass on the validity of his efforts, until it had given him an opportunity to testify to what he had done. The Lower Courts, in this case, refused to permit Relator the opportunity and right under the cases to show that it was impossible for him to depart voluntarily. The Dorfler case[10] was cited as authority for the decisions by both the District Court and the Court of Appeals, although the Hoehn case[11] subsequently explained that case. The fact that the Supreme Court refused certiorari in each of those cases was given as the reason for their decisions, yet the Relator in each of those cases had failed to offer to prove that he had made any efforts to voluntarily depart.

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[10] U. S. *ex rel* Dorfler *v.* Watkins (Note 5, *supra*).

[11] U. S. *ex rel* Hoehn *v.* Shaughnessy (Note 4, *supra*).

That is the difference in the instant case. This is the only case, to our knowledge, where Relator offered to show that he attempted to depart, that the Respondent had interfered with his efforts and that his inability to depart was the direct result of Respondent's actions. That is the very proof the cases demanded of him, and the proof they refused to permit him to offer.

Respondent further defends by saying that even if the United States Government requested certain other governments not to receive Relator, that the Governments did not have to comply with the request. Legally no, but practically yes. At least that was the result. It is not for this Government to decide that Relator must or must not go to another country whose principles of Government are compatible with ours or his.

Ia.

The effect of a denial of certiorari.

Respondent has stressed the refusal of the Supreme Court to allow certiorari in the two cases that it cites as authority for its defence, *i. e.*, the Dorfler[10] and Hoehn[11] cases; and argues that the denial of certiorari is an affirmance by the Supreme Court of the Lower Court decisions, and of their refusal to allow this Relator a fact issue. This is not so, for Mr. Justice Reed said:[12]

> "it is a well established rule that a denial of certiorari does not prove anything except that certiorari was denied."

That case has become a standard authority, wherein two concurring judges and the three dissenting judges all agreed that denial of certiorari means nothing as to the merits. Dictum joined in by a majority of the Supreme Court is the best available authority.

This Lower Court likewise reviewed a like situation in an opinion filed October 26, 1951.

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[12] Darr *v.* Burford, 339 U. S. 200 at 217; see also U. S. *ex rel* Auld *v.* Warden, 187 Fed. 2nd 615; McGarty *v.* O'Brien, 188 Fed. 2nd 151.

Where the Judge said:

> "Our narrower question is: What effect in the Lower Federal Courts is to be given to the denial of certiorari by the Supreme Court?"[13]

He then cited at length from the Darr case[12] and concluded that certiorari did not relieve the Lower Court from an examination of the facts. He described it as uncomfortable for the Lower Court to sit in, what is in effect a review of the Higher Court, and he would surely wish to be relieved, but no directions are given to the Lower Court by the denial of certiorari.

Judge Goodrich then concluded with these words,

> "We think that what we must do, until we are told to the contrary, is to follow the well established rule that the denial of certiorari does not prove anything."

It is the same as though the Supreme Court had never seen the case nor considered it. It is a Lower Court decision. Nothing more.

II.

An enemy alien has been denied the benefits of Procedural Process, under the Fifth Amendment.

Mr. Justice Chase in the Von Heymann case (*supra*) said that the power to remove was vested in the President, in certain cases, to maintain the Security of the country. The Presidential Proclamation was made July 14, 1945. Relator was in custody from 1941 until 1947, when the Defendant decided to remove him. The War was over. The Government was seeking a rapprochment with Germany. Relator has been free since 1947. The Court in that case went on to say:

> "But tho the Statute under which appellee is restraining Relator, pursuant to executive orders, is ap-

[13] U. S. *ex rel* Smith *v.* Baldi. # 10,433, Third Circuit (not yet recorded).

plicable, it does not follow that the present restraint is lawful."

We quote the Japanses Immigrant case[14].

> "This Court has never held, nor must we now be understood as holding, that Administrative Officers, when executing the provisions of a Statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. Therefore it is not competent for—an executive officer,—arbitrarily to cause an alien—even tho illegally here—to be taken into custody and *deported without giving him* all opportunity to be heard,—no such arbitrary power can exist where the principles involved in due process of law are recognized."

An alien within the United States, particularly if lawfully here, unlike one applying at the border, is entitled to the full benefits of procedural due process under the Fifth Amendment.[15]

This must mean that in a removal proceeding grounded in National Security, as in all other proceedings, expulsion may be ordered only in accordance with law, after a fair hearing at which the alien is fully apprised of the evidence against him and given an opportunity to be represented by Counsel, to refute the charges and to present countervailing evidence[16] and the decision must be based on the evidence in the Record.[17]

This is a removal case, but an analogy is a deportation case in which limited judicial review can be invoked by Habeas Corpus, and the inquiry then is whether a fair hearing in conformity with law was had on the basis of substantial evidence.[17] That is our instant case. As in the Von Kleczkowski case (*supra*) Relator sought to prove not that the decision-

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[14] The Japanese Immigrant Case, 189 U. S. 86 (23-4 U. S. Rep. 309).

[15] Wong Yang Sung *v.* McGrath, 339 U. S. 33 (1950) (70 U. S. Rep. 445).

[16] Whitfield *v.* Hanges, 222 Fed. 745.

[17] Vajtauer *v.* Commissioner, 273 U. S. 103 (47 U. S. Rep. 303); Bridges *v.* Wixon, 326 U. S. 135 (65 U. S. Rep. 1443).

was wrong, but that evidence was improperly received, that he was never acquainted with the charges, nor faced with his accusers, that the evidence was never known, and but for that unproduced evidence, it is wholly speculative, yes, in this case definitely determined that no adverse finding could have been made as Mr. Justice Jackson said in his dissent in the Knauf case:[18]

> "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized any administrative officer to break up the family of an American citizen * * *"
>
> "I cannot agree that it (Congress) authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."
>
> "I should direct the Attorney General either to produce his evidence justifying exclusion, or to admit Mrs. Knauf to the country."

The above is particularly applicable in the instant case because Jaegler was at the outset and continuously thereafter informed that he was not entitled to know the charges leveled against him, that he was not entitled to be represented by Counsel and that he was not entitled to produce witnesses on his own behalf. In connection with the proceedings which resulted in the removed order. This is what we mean when we say he was denied *due process of law.*

This question has not been before the Supreme Court except in the Ludecke Case (*supra*) where relator did not have counsel but argued the case himself as a layman, and when questioned by the Court as to what he meant by due process, merely said, "I was denied due process," without explaining what he was denied.

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[18] Knauf *v.* Shaughnessy, 338 U. S. 537 (70 U. S. Rep. 309); Klaprott *v.* United States, 335 U. S. 601; 336 U. S. 942 (69 U. S. Rep. 384).

III.

Was the removal "Order" in violation of the spirit and letter of international agreements?

At the outbreak of activities, on December 8, 1941, an emergency arose which required that our Government take every precaution to protect itself and our country. That was common sense, and as citizens we are thankful that it was done. Along with thousands of other persons, Relator was detained in custody "for the duration of the emergency". To all intents and purposes, the emergency ended in 1945. Congress has now terminated the war with Germany. He was only interned during the emergency to prevent him from doing any harm, not because he had done any harm already. It was a preventive measure only. His record is clean.

Relator was released, on parole, in July 1947, and has been at unrestrained liberty from then to the present time. If there was any justification for his detention in 1941, it certainly has long since ceased to exist. We can only surmise that the cause has ceased to exist, but we do not yet at this late date know what the cause for the arrest was. We were never told.

It is to the pressing of the action for Relator's removal in the year of Grace 1951, that we now address ourselves. In the Preamble to our own Constitution, we declared "all men are endowed by their Creator with certain inalienable rights—among these—life, liberty and the pursuit of happiness"; but of what use are they to Relator, if he can not enjoy them. Remember, he was and is lawfully within this country and therefor entitled to the enjoyment and protection of those rights.

Methinks it was for the preservation of human rights that we fought our wars, including, with much protestation, the last two in Europe. In order to safeguard the rights of individual people, we then caused to be formed the United Nations and the United Nations Charter. It was prepared here, signed here, fought for here as well as in Korea. It is the Law of this Counrty for it was ratified by Congress

on July 28, 1945. Article 55 was addressed to the observance of human rights and the preservation of human freedoms. In recommending the adoption of the Participation Act of 1945, the President said: "our first need is to take part in the several agencies" of that organization.

Our Country took part in a number of conferences with other nations, resulting in the adoption of Rules for the Emergency Advisory Committee for Political Defence, and the Act of Chapultepec. The rules were formed and adopted at our insistence, and on April 12, 1946 the Emergency Advisory Committee adopted Resolution XXVI, which recommended a uniform standard for all proceedings relative to removal, and proposed certain criteria as to what constituted "dangerous persons". Paragraph 3 a-b set forth some considerations to be considered in determining the advisability of removing such persons. These were later incorporated into the Inter-American Treaty of Reciprocal Assistance of September 2, 1947.

Relator has been the husband of an American citizen since 1930, and has lived with her and supported her during all of that time, except during his incarceration.

We must assume that our Government intended to be bound by the United Nations Charter and the other International Agreements, because we claim to be fighting to preserve the sanctity of International Agreements. They may not be Treaties; but Presidential Proclamations, and private decisions of the Attorney General's Office are not, either.

While Resolution XXVI was specifically addressed to the control and detention of persons who actively supported the war efforts of the enemies, it was also intended to cover that much larger group who were considered dangerous or possibly dangerous. It recited that almost all countries limited the measures taken to detention—either for humanitarian or security reasons, and that many were set free before the end of 1945. It recited that Resolution XX only recommended detention for the duration of the War; and that

any one really dangerous should not be released, even to his own country. It defined as follows:

Part II, (A) Criteria for determining whether a person is dangerous, (1) dangerous persons—those who have engaged in

(a) "* * * *espionage, sabotage or other subversive Acts* to the detriment * * *"

"It shall not be necessary to have a penal conviction * * * but to have proof of such facts.

(b) *Military participation.*

(c) *Participation in propaganda or commercial operations.*

Different treatment was provided for different degrees of dangerousness.

By Paragraph A-2 of the Resolution itself, dangerous persons were classified as above set forth, and by Paragraph A-3 it was suggested that even if such person was deemed dangerous, it should not apply to a person who could show that his spouse * * * was a national of an American Republic and that the conjugal ties had been established and are maintained in good faith.

(Attached to and forming part of Defendant's Motion to Dismiss the Petition for Habeas Corpus. Excerpts therefrom (R-28)).

IV.

Whether the Joint Resolution of Congress, approved October 19, 1951 (Public Law 181; 82nd Congress, chapter 519; 1st Session; N. J. Res. 289) terminating the War with Germany, also terminated the authority and power of the President, and hence the Department of Justice to remove Relator:

Relator was ordered removed by the President, under authority of the Alien Enemy Act of 1798; as amended. He was ordered removed "as a preventive measure"; possibly

to insure the safety of the country. There has never been any intimation that he had been guilty of any offense, overt or otherwise. If there had been the slightest evidence of his guilt, he would have been indicted and tried. He would certainly not have been set at large, as he has been since 1947. He was, like hundreds of other aliens, protected from themselves and kept away from any possibility of trouble. He was kept in detention camps, not in prison. He was an enemy alien only because he was a native of an enemy country, not because he was an enemy.

Congress passed the Joint Resolution terminating the War with Germany on October 19, 1951, and the President by Proclamation 2950 (16 Federal Reg. 10915) announced that fact as accomplished.

Hence we should consider the effect of that Resolution on the status of the Relator, independent of the reasons previously argued.

Justice Learned Hand[19] held:

> "We must dispose of Orders entered in Habeas Corpus Proceedings according to the law as it exists at the time when we decide the appeal, and not at the time when the Order itself was entered."

What is the law and its application at this time? It is that the Alien Enemy Act of 1798 as amended and the Presidential Order pursuant thereto are no longer effective because the facts on which the Order was predicated no longer exist. The Resolution of October 19, 1951 terminated that.

Respondent has suggested that the Statute of July 30, 1947 c 388 section 1 (61 Statute 633) continues the status of this Relator; that he was guilty of some thing then and so he continues to be guilty.

The relative part of that Statute is quoted,

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[19] U. S. *ex rel* Wiczynski *v.* Shaughnessy, 185 Fed. 2, 349, also U. S. *ex rel* Pizzuto *v.* Shaughnessy, 184 Fed. 2, 666; U. S. *ex rel* Ludecke *v.* Watkins, 163 Fed. 2, 143; 335 U. S. 160.

> "The *Repeal of any Statute* shall not have the effect to release or extinguish any penalty, forfeitive or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper actions or prosecution for the enforcement of such penalty."

That would possibly be so if he had been guilty of any overt act, or indicted for such. He was not. He was detained in custody, out of harm's way. The authority to remove lasted only so long as a declared war existed and peace had not been formally declared.[20] The words of the Act "the repeal of any Statute shall not have the effect to release or extinguish any penalty, forfeiture or liability occurred" does not apply to the present detention case. Relator had not been penalized, nor had he forfeited anything nor incurred any liability.[21] The Government had restrained his liberty temporarily. He has not voluntarily incurred any punishment.

Under the Common law, the repeal of a Statute terminated the right to punish under it. The present act, being an exception to the Common Law, must be strictly construed[22] and it must be limited to the repeal of Statutes and not to regulations promulgated by an administrative officer under legislative authority. It has been held that such section of the Statute of 1947 is not applicable where the Statute itself is not repealed.[23] The Statute of 1798 was not repealed. The State of War was terminated. A fact changed. The law of the Statute remained valid. It was the Presidential Order, and the Removal Order that were no longer effective, because the facts which caused the authority of the Act of 1798, as amended, to be exercised no longer existed; that is a state of war.

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[20] U. S. *ex rel* Ludecke *v.* Watkins, 335 U. S. 160; U. S. *ex rel* Kessler *v.* Watkins, 163 Fed. 2nd 140.

[21] Rodgers *v.* United States, 158 Fed. 2nd 835.

[22] U. S. *v.* Auerbach, 68 Fed. Supp. 776.

[23] U. S. *v.* Chambers, 291, U. S. 217.

The Saving Statute of 1947 does not apply, because there was no repeal of a Statute or a law. The exact words of the Statute itself make it apply only in the case of the repeal of a Statute.

Respondent has suggested that Relator's freedom since July 1947 was due to an observance of Rule 45 of the Supreme Court of the United States. At no time after July 1947, did the Government make any attempt to restrain Relator's freedom or even intimate that he might be dangerous to the National Security. If they had so deemed him dangerous, they could have requested the Lower Court to restrain his liberty under Rule 45.

No better result could be obtained in the instant case by remanding the case back to the Lower Court for consideration of the effect of Public Law 181, being the Joint Resolution of Congress of October 19, 1951 terminating the War.

V.

For the reasons already advanced, the Circuit Court of Appeals, by its opinion of April 2, 1951, erred.

CONCLUSION.

It is therefore respectfully submitted

THAT the Resolution of Congress of October 19, 1951 terminating the war with Germany, likewise terminated the authority of the President to order the removal of Relator,

THAT there now exists no authority to remove Relator or to continue or sustain the present order of removal,

THAT the order remanding the Relator to the custody of the Respondents is now invalid and should be ordered rescinded,

THAT the prior question of the deprivation of Relator's right of voluntary departure is therefor moot,

THAT the Decrees of the Lower Courts should be vacated, and Relator discharged, released and permanently, set at liberty,

THAT if the question of the depreviation of Relator's right to voluntarily depart under the removal order is not moot, then the Relator is entitled to show that the government actions did effectively nullify his efforts, and that he is entitled to have the fact issue tried,

THAT Relator was deprived of the right to procedural due process under the Fifth Amendment,

THAT the Removal Order was in violation of International Treaties and Agreements,

THAT the United States Court of Appeals for the Third Circuit erred in affirming the Order of the District Court, dismissing the Writ of Habeas Corpus and remanding Relator to the custody of Respondent,

and therefore

the judgment of the Court below should be reversed, with directions to remand the cause to the District Court for entry of Appropriate Order or Decree discharging and releasing Relator from custody, or

in the alternative to direct the District Court to award Relator a trial issue of fact.

Respectfully submitted,

GEORGE C. DIX,
GORDON BUTTERWORTH,
Counsel for Petitioner.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067, as amended, 50 U.S.C. 21, provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable, the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

A PROCLAMATION.

Whereas section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war

between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungry, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189), pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U.S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U.S.C. 21.

§ 30.71 *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F.R. 8947), dated July 14, 1945, provided in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by

the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen, or subject.

§ 30.73 *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM CLARK, *Attorney General.*

(F. R. Doc. 45-18005; Filed Sept. 27, 1945: 10:11 A.M.)